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Supreme Court of the United States

October Term, 1929.

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Nos. 456 and 457.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Appellee.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

PHOENIX ASSURANCE COMPANY, LTD., LONDON,
Appellee.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEES

RALPH E. LUM,
Counsel for Appellees.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

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OCTOBER TERM, 1929.

O'GORMAN AND YOUNG, INCORPORATED, *Appellant*, *vs.* HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Appellee.*	*No. 458.*
O'GORMAN AND YOUNG, INCORPORATED, *Appellant*, *vs.* PHOENIX ASSURANCE COMPANY, LTD., LONDON, *Appellee.*	*No. 459.*

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEES.

POINT I.

The Legislature of the State of New Jersey has power to regulate the amount of commissions to be paid fire insurance agents.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 413.

> "We can see, therefore, how it has come to be considered a matter of public concern to regulate it and governmental insurance has its advocates

> and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals."

The power of the State over the subject of insurance extends to those engaged in carrying on the business.

> "And it necessarily follows that as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is."
>
> *LaTourette* v. *McMaster*, 248 U. S. 465-467.

The Court of Errors and Appeals of the State of New Jersey in *McCarter* v. *Firemen's Insurance Company*, 74 N. J. Eq. 372, determined that the business of insurance was affected with a public interest:

> "The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interest of the public, and that such public interest has been recognized as a subsisting one by the Legislature of this State, and that in point of law the business of the defendants is affected with a public interest."

With the nature of this business thus settled and determined, the Legislature of the State of New Jersey during its session of 1928 amended the General Insurance Act for the purpose of protecting the interest of the public in this line of business activity. By such legislation it was among other things provided as follows:

> "In order that rates for insurance against the hazards of fire shall be reasonable, it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to

directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

Laws of 1928, Chap. 128, p. 257.

POINT II.

The New Jersey Statute is not an arbitrary exercise of the power of regulation.

The New Jersey legislation is not arbitrary and has a reasonable relation to a purpose which it is competent for government to effect.

> "What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited."
>
> *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389-414.
>
> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."
>
> *Chicago, Burlington and Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, 569.

It is clearly within the province of the Legislature to establish the police power and to determine the means to achieve the desired result. The legislation under con-

sideration is claimed to be an unreasonable interference in the management of the business of the company and to be more or less indefinite. The statute was enacted in order that the rates for insurance against the hazards of fire shall be reasonable. Companies are prohibited from paying commissions or other compensation in excess of a reasonable amount. It is objected that this feature of the statute is indefinite because no maximum or minimum amount is mentioned. However, the Commissioner of Banking and Insurance is given a visitorial power over these corporations and he may move on his own initiative or on the complaint of others.

It is further objected that the provisions of the Act under consideration, which requires the rates of commission to be uniform are also unreasonable, and that such rates have no relation to the business of a fire insurance company affected with a public interest. Evidently the object of the Legislature here was to prevent discrimination in the amount of commissions paid and to establish the commissions paid at the lowest rate now obtaining on any particular class of risk. In the judgment of the Legislature, this served to protect the general public welfare and tended to strengthen the insurance companies rather than weaken them by paying away part of their premiums in exorbitant commissions.

Again, it is apparent from the penalty provision of the Act that it was the intent of the Legislature to hold the commissions thereafter paid to agents to the minimum amount paid to them at the time the legislation was passed. In case an insurer is convicted of discrimination, every local agent becomes entitled to the same commission received by such agent, for business done during the calendar year in which the discrimination took place. When all these provisions are considered, it becomes apparent that the object of the Legislature was to preserve to the companies as much as possible of the premiums

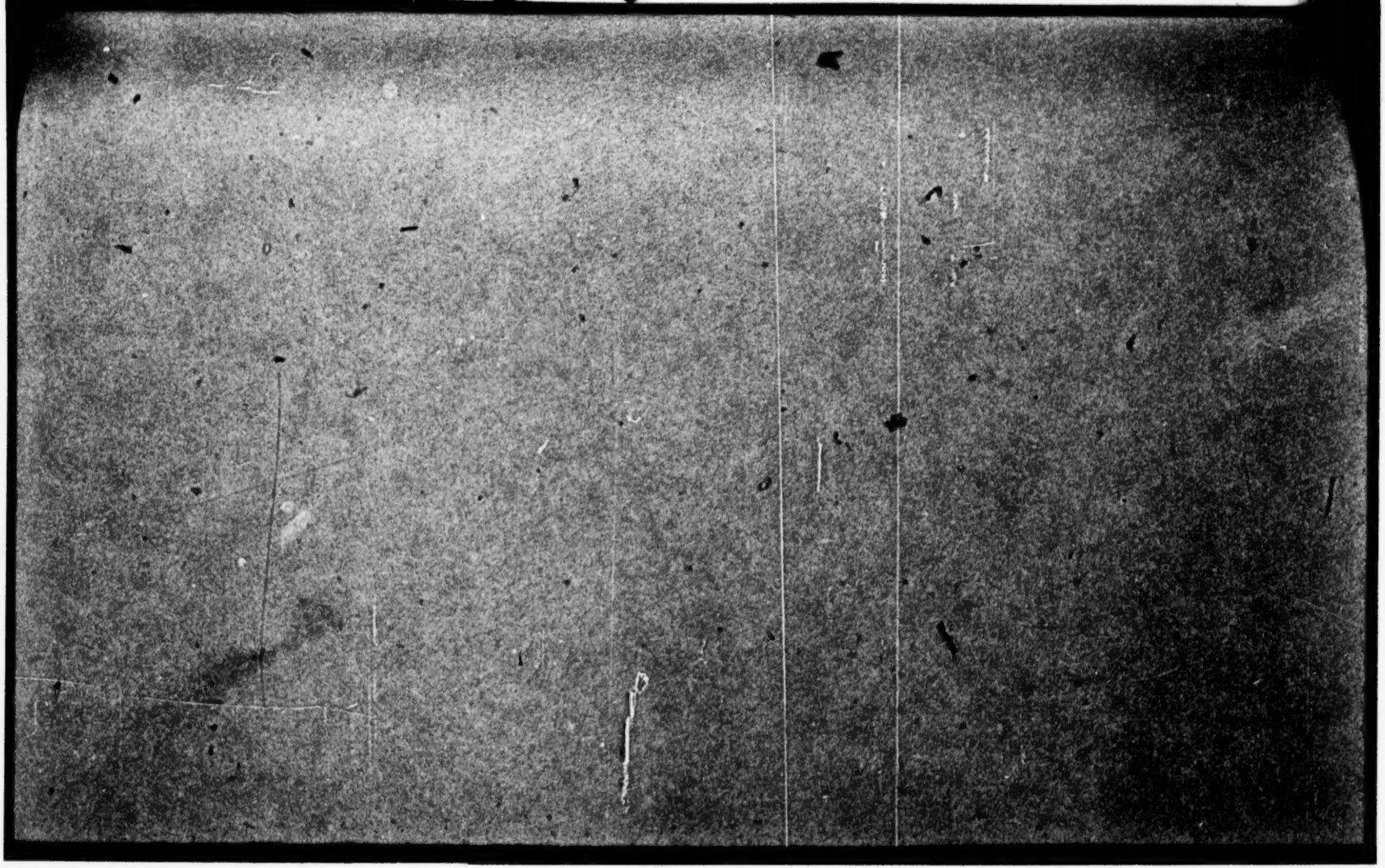
they received for writing fire insurance, so that thereby they will be the better enabled to meet any losss which may be sustained by policy holders throughout the State.

CONCLUSION.

We submit that the legislation under consideration is a lawful exercise of the legislative police power and that the regulation and limitation of agents' commissions therein contained, is lawful and not violative of the Federal Constitution.

Respectfully submitted,

RALPH E. LUM,
Counsel for Appellees.



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APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

SUPPLEMENTAL MEMORANDA FOR APPELLEES.

Pursuant to permission granted on oral argument, we are setting up herewith all legislation in various States of the Union in any way dealing with the matter of commissions of insurance agencies.

The State of Mississippi, Chapter 188, Laws of 1924, in effect April 8, 1924, passed a law being "An Act to

Create an Insurance Company and Rating Bureau," providing by Section 10:

> * * * "The insurance commission shall, immediately after the passage of this act, and on the 1st day of November annually thereafter, address a written communication to every stock fire insurance company authorized to do business in Mississippi and secure its written opinion as to the amount of commissions the authorized stock fire insurance companies in this State should pay local agents for the remainder of the year 1924, and for each ensuing year after January first. The insurance commission shall then compile this information and shall advise the rating bureau as to the majority opinion, which majority opinion shall fix the amount or rate of the commissions to be paid local agents in this State; which amount or rate of commissions to be paid said local agents shall be kept at all times uniform as to the classes of risks throughout the State, in order that the profits of said stock fire insurance companies doing business in this State may be accurately ascertained."

The State of Louisiana by Act No. 302, Laws of 1926, being "An Act to Establish Uniform Rates for fire, wind, storm and hail, and automobile, fire and theft insurance in Louisiana, to provide for the organization of a rating and fire prevention Bureau; to create an Insurance Commission", provided under Section 8:

> "* * * In order to prevent unfair discrimination by any stock fire insurance company coming under the provisions of this Act in the compensation to be paid to its local agents in Louisiana, each stock fire insurance company doing a fire, windstorm, hail and automobile fire and theft insurance business in this State, on or before the first day of December, 1926, and annually thereafter on or before the first of December of each year, shall file with the Insurance Commission a schedule of rates as well as all other compensation whatever which each company will pay its respective local agents within this State for the ensuing calendar year,

provided that the said rate of commission, as well as all other compensation to be paid by each company, shall be uniform and equal as to all of the local agents of said company throughout this State."

It was suggested by someone on the argument that the State of Texas had a statute dealing with the subject. There is, however, no statutory law to be found in Texas on the subject. The Texas Board of Insurance Commission attempted to fix compensation that the companies should pay their local agents.

Off the record, we are advised that the rate of commission paid in Louisiana and Mississippi is twenty per cent. on the fire insurance business.

Since the enactment of the law in New Jersey, now under attack, some companies are paying a commission in excess of thirty-five per cent.

We are unable to find any decisions indicating that the twenty per cent. minimum rate now paid in Louisiana and Mississippi is under attack or that there has been any attempt made to test the constitutionality of either act.

During our oral argument, we gathered from questions addressed by members of the Court that doubt was entertained as to the good faith of the defendants in question in defending the statute in question. We have felt that our success before two courts in this State justified the good faith of our effort.

The defendant companies can conform to the Act under attack as they could not perhaps do under the statutes above recited. The companies have been advised that they may interpret the Act in question to the effect that they are not limited to twenty per cent. or thirty per cent. or any other per cent.; that it may pay any one agent any rate of commission it chooses, but must pay that same rate to all of its local agents.

As the New Jersey Court of Errors and Appeals had suggested no question of good faith, and raised no objection to the form by which the constitutionality of the New Jersey Act was being tested, we were perhaps not as prepared as we might have been to meet the queries that arose on the argument.

The constitutionality of such an Act as that which we are now dealing with is in many jurdisdictions raised by an attempt to enjoin. It will, of course, be kept in mind that in New Jersey the law and equity jurisdiction is as complete as ever under the common law of England. The resort to injunctive methods in this jurisdiction leads frequently to friction of jurisdiction as between law and equity, and the case may go off without decision on the real queston in issue, to wit, the constitutionality of the Act in question.

No case can be found in New Jersey in which the constitutionality of any statute has been tested by seeking injunctive relief. "The question of the validity of this ordinance, however, I must decline to pass upon, that being the peculiar province of the court of common law." *Bayonne* v. *Borough of North Arlington*, 77 N. J. Eq. 166, At. 169.

R. 31, indicates the vote of five lay judges on the decision of the case in question in New Jersey. Three of the lay judges are not lawyers. The question presented lead to a decision in which both the law judges and the lay judges differed.

The insurance companies in question have long dealt with O'Gorman & Young, and recognize their ability as agents. If there had been no legislation such as exists they would doubtless have been paid twenty-five per cent. If the legislation now existing is constitutional, they cannot pay them more than twenty per cent. at the present time, as they pay that amount to several local agents.

Under the circumstances, they are desirous of final determination as to the constitutionality of the Act in question.

We believe that every case that can throw light on the subject has been presented to this court.

Respectfully submitted,

RALPH E. LUM,
Counsel for Appellees.